ORIGINAL

Supreme Court, U.S.
FILED
FEB 13 1985
ALEXANDER L. STEVAS
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1984

No. 84-762

AMOS E. REED, et al.,
Petitioners,

v.

CHARLES J. SLAKAN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

N.C. PRISONER LEGAL SERVICES, INC.
Charles T.L. Anderson

Post Office Box 509
Raleigh, North Carolina 27602
Telephone: (919) 828-3508

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

QUESTION PRESENTED..... 1

PARTIES TO THE PROCEEDING..... 2

OPINIONS BELOW..... 2

JURISDICTION..... 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... 2

COUNTERSTATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT..... 7

A. PETITIONERS FAILED TO OBJECT TO THE JURY INSTRUCTIONS REGARDING THE LEGAL STANDARD FOR § 1983 SUPERVISORY LIABILITY..... 8

B. THE COURTS BELOW APPLIED THE CORRECT AND ACCEPTED STANDARD OF LIABILITY FOR § 1983 SUPERVISORY LIABILITY 10

C. THE DECISION BELOW IS CONSISTENT WITH THE LAW THROUGHOUT THE CIRCUIT COURTS OF APPEAL..... 15

D. THE EVIDENCE IS SUFFICIENT TO SUPPORT THE JURY'S VERDICT..... 16

CONCLUSION..... 17

CERTIFICATE OF SERVICE

APPENDIX

TABLE OF AUTHORITIES

CASES

Allee v. Medrano, 416 U.S. 802 (1974) 10

Bowen v. Watkins, 669 F.2d 979 (5th Cir. 1982) 15

Estelle v. Gamble, 429 U.S. 97 (1976) 14

Hague v. CIO, 307 U.S. 496 (1939) 10

Haygood v. Younger, 718 F.2d 1472 (9th Cir. 1983) 16

Hays v. Jefferson County, Ky, 668 F.2d 869 (6th Cir. 1982) cert. denied, 459 U.S. 833 (1984) 15

Herrera v. Valentino, 653 F.2d 1220 (8th Cir. 1981) 16

Jerry v. Francisco, 632 F.2d 252 (3d Cir. 1980) 15

King v. Higgins, 702 F.2d 18 (1st Cir. 1983) 15

Lenard v. Argento, 699 F.2d 874 (7th Cir. 1983) cert. denied, ___ U.S. ___, 104 S.Ct. 69 (1983) 16

Languirand v. Hayden, 717 F.2d 220 (5th Cir. 1983) 15

McCann v. Coughlin, 698 F.2d 112 (2nd Cir. 1983) 15

McClelland v. Factueau, 610 F.2d 693 (10th Cir. 1979) ... 16

Monell v. New York City Department of Social Services, 436 U.S. 658 (1978) 9,10,12,13

Morris v. Travisono, 528 F.2d 556 (1st Cir. 1976) 10

Orpiano v. Johnson, 632 F.2d 1096 (4th Cir. 1980) cert. denied, 450 U.S. 929 (1981) 8

Owens v. Haas, 601 F.2d 1242 (2nd Cir. 1979) cert. denied, 444 U.S. 980 (1979) 15

Rizzo v. Goode, 423 U.S. 362 (1976) 10,12,13

Turpin v. Mailet, 619 F.2d 196 (2nd Cir. 1980) cert. denied, 449 U.S. 1016 (1982) 15

Villanueava v. George, 659 F.2d 851 (8th Cir. 1981) 16

Wanger v. Bonner, 621 F.2d 675 (5th Cir. 1980) 15

Webster v. City of Houston, 689 F.2d 1220 (5th Cir. 1982) 15

White v. Washington Public Power Supply System, 692 F.2d 1286 (9th Cir. 1982) 16

Williams v. Bennett, 689 F.2d 1370 (11th Cir. 1982) cert. denied, ___ U.S. ___, 104 S.Ct. 335 (1983) 16

OTHER AUTHORITIES

Eagan, The Scope of Supervisory Liability Under 42 U.S.C. § 1983, 6 J. Contemp. L. 181 (1979) 15

Municipal Liability Under Section 1983: The Meaning of "Policy or Custom," Note, 78 Col. L. R. 308 15

5A Moore Federal Practice § 50.07 (2nd Ed. 1977).. 16

NORTH CAROLINA STATUTES AND REGULATIONS Appendix

N.C. Gen. Stat. § 148-4, 11, 20, 31, 36 ..... K 3

5 NCAC 2A .0101 ..... K 4

5 NCAC 2F .1502 (3)(4) ..... K 5,6

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1984

No. 84-762

AMOS E. REED, et al.,
Petitioners,

v.

CHARLES J. SLAKAN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

TO: THE HONORABLE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE SUPREME
COURT OF THE UNITED STATES

The Respondent, Charles J. Slakan, prays that a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, filed June 5, 1984, and Order denying the Petition for Rehearing, filed August 13, 1984, be denied.

QUESTION PRESENTED

Pursuant to Supreme Court Rule 34.2, Respondent Charles J. Slakan offers the following correction and supplementation to Petitioner's statement of the Question Presented.

WHETHER STATE PRISON SUPERVISORY OFFICIALS CAN BE HELD PERSONALLY LIABLE FOR DAMAGES UNDER 42 U.S.C. § 1983 FOR THE UNCONSTITUTIONAL USE OF FORCE AGAINST A SINGLE, CELL-CONFINED INMATE BY TWO GUARDS ON THE BASIS OF THEIR DELIBERATE INDIFFERENCE TO OR TACIT AUTHORIZATION OF A PATTERN OR PRACTICE OR POLICY OF INDISCRIMINATE OR EXCESSIVE USE OF FORCE AGAINST CELL-CONFINED INMATES WHICH WAS FOUND BY A JURY TO CAUSE THE UNCONSTITUTIONAL ASSAULT.

PARTIES TO THE PROCEEDING

OPINIONS BELOW

JURISDICTION

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Pursuant to Supreme Court Rule 34.2, these items are omitted since Respondent is satisfied with Petitioners' statement of each of these items.

COUNTERSTATEMENT OF THE CASE

Pursuant to Supreme Court Rule 34.2, Respondent Charles J. Slakan offers the following correction and supplementation to Petitioners' statement of the case.

First, Petitioners claim that guards "squirted or attempted to squirt him with two fire hoses" and "[A] small amount of tear gas was also sprayed into the cell by Walters." (PWC p 6).[1] Testimony during the trial indicated that two high pressure fire hoses and a dispenser of CS gas were used against Mr. Slakan while he was unarmed and locked in a single cell. The parties stipulated that manufacturer's instructions expressly stated that the CS gas was not for indoor use. Respondent testified at trial that the water pressure from the fire hoses forced him to the back of the cell and forced all the air out of the cell, making breathing difficult and requiring him to brace himself against the cell sink to keep from falling or being knocked to the floor. When he attempted to indicate his submission to the guards, the spray was directed at his hand and head. (Respondent's Appendix A 3-6). Then gas was sprayed into the cell, causing Mr. Slakan's lungs and eyes to burn and making breathing even more difficult.

---

[1] The parenthetical reference "PWC" is shorthand for Petitioners' Petition for a Writ of Certiorari to the United States Fourth Circuit Court of Appeals. "Respondent's Appendix," referenced in the text is lodged with the Clerk's Office and is not attached to the Respondent's Brief in Opposition.

When he attempted to move to the front of the cell to get air, the spray of the hoses was used to pin him to the back of the cell. (Respondent's Appendix A 7-11). Three guards then entered the cell and beat him repeatedly with night sticks or riot batons about the head and body (Respondent's Appendix A 12-19), resulting in bruises, contusions and four lacerations requiring sixty-one (61) sutures and considerable loss of blood. (Respondent's Appendix B 1). Mr. Slakan's account of the force used against him was corroborated by the testimony of an inmate in an adjacent cell and by the testimony of inmate James C. Mitchell, who similarly described a hosing he suffered while handcuffed and locked in a cell.

Second, with respect to Mr. Slakan's claims against the Petitioners, evidence and testimony not mentioned in Petitioners' statement (PWC p 4-5) was offered in support of the affirmative link or causal connection between the unconstitutional assault on Mr. Slakan and the conduct of the Petitioners.

As Petitioners note, eight accounts of use of force against cell confined inmates, including one incident in which the inmate was hosed while handcuffed and locked in his cell, were admitted into evidence. Each of these incidents, which occurred within the year preceding the assault on Mr. Slakan, is described in the opinion below. (Petitioner's Appendix A 14, 15). The 1975 Inmate Grievance Recommendation against indiscriminate use of high pressure fire hoses against cell-confined inmates[2] (Respondent's Appendix C-5) was also admitted into evidence. That report found that high pressure hoses were being used against cell-confined inmates for periods of 10-60 minutes. Mr. Slakan also introduced expert opinion testimony to support his claim that Petitioners knew or should have known of guards' abusive conduct and acquiesced in or approved said practices causing his unconstitutional assault.

---

[2] It was stipulated at trial that under state law the Commission consisted of five persons appointed by the Governor with a statutory duty to investigate inmate complaints and, upon a finding of merit, report its findings and recommendations to the Secretary of Correction.

Robert E. Swiger, Town of Carrboro Fire Chief, testified at trial in a video-taped deposition, demonstrating the prison fire hose for the jury at the 55 p.s.i. (pounds per square inch) pressure which Mr. Slakan identified as comparable to the force he was subjected to. This pressure was also certified in prison tests of the hose. Fire Chief Swiger testified that a straight stream of water from that hose "could probably hurt" a man "in critical areas of the body," that the water could probably streak or redden the back or chest, and, depending upon the size of the individual, it could knock him down or push him back. (Respondent's Appendix D 1,2).

Arnold Pontesso, now retired after serving as a warden at U.S. Bureau of Prisons and as Secretary of Correction in Oklahoma, testified that the approved policies permitting use of high pressure fire hoses and tear gas against cell-confined inmates could not be justified penalogically and constituted summary punishment. (Respondent's Appendix E 2). Mr. Pontesso further testified that the Department of Correction's Response (Respondent's Appendix F 1-2) to the 1975 Inmate Grievance Commission Recommendation manifested "a callous disregard for the safety and security of inmates" and that, in his opinion, the evidence established that a pattern or practice of excessive use of force against cell-confined inmates[3] existed at Central

---

[3] Additional evidence supporting this finding (and corroborating Mr. Slakan's testimony) included the testimony of one defense witness who testified that as a guard at Central Prison he had been personally involved in five or six hosings, that the general practice was to put the nozzle in the food tray of the cell foor, 106 inches from the back of the cell, that inmates would attempt to crawl under their bunks on the wet cell floor to get away from the hose spray, that the force of water was strong enough to knock a coffee cup out of an inmate's hand and pin him to the back wall of the cell, that the water would knock an inmate around the back of his cell at full pressure and that the water would sting and bruise an inmate's skin. (Respondent's Appendix G 1-10).

Defendant Sgt. Walters, a guard at Central Prison, testified somewhat ambiguously that he would use the high pressure fire hose to force the air out of the cell and that the hose, when operative, required two men to hold the nozzle. (Respondent's Appendix H 5-7). He further testified that he had received no formal training in use of the high pressure fire hose or the CS gas (except observed demonstrations) and he had no knowledge that the CS gas was not recommended for indoor use. (Respondent's Appendix H 1-3).

Defendant guard Porter, who testified on direct that he hit Mr. Slakam "like he would a dog," (Respondent's Appendix I 1), admitted on cross-examination that the high pressure hose, when

Prison. (Respondent's Appendix E 10,14,22,31,32). Finally, Mr. Pontesso testified that, in his expert opinion, the assault upon Mr. Slakan was a result of policies or customs approved by the Petitioners, and these supervisory officials failed to take reasonable steps to insure that fire hoses, tear gas and billy clubs used against cell-confined inmates would not be used in an excessive and unjustified manner. (Respondent's Appendix E 23-26, 31).

In addition to Petitioners' admission[4] in their Answer that they approved the use of high pressure fire hoses and tear gas against cell-confined inmates, further evidence came into the record to support the causal relationship between their conduct and the assault on Mr. Slakan.

Petitioner Reed

Correctional expert Pontesso testified that Secretary Reed should have known of the Inmate Grievance Commission Recommendation in the exercise of ordinary care as Secretary of Correction. (Respondent's Appendix E 12-13, 31). Petitioner Garrison testified that he assumed Petitioner Reed knew of the manner in which hoses were used against cell-confined inmates. (Respondent's Appendix J 9). Mr. Pontesso further testified that use of force practices accepted or approved by Petitioner Reed

---

operative, required two men to hold and operate it. (Respondent's Appendix I 4). Porter further testified that no supervisor had ever personally reviewed a use of force incident with him and that he received no formal training in the use of a riot baton. (Respondent's Appendix I 5-7).

[4] Petitioners now contend that a fact admitted in their Answer and stipulated to in the Pretrial Order, i.e. that Petitioners approved of the use of high pressure fire hoses and tear gas against individual cell-confined inmates, was not read to the jury. Respondent contends that this stipulated fact was read to the jury after they viewed the video taped deposition of Fire Chief Swiger, which included a demonstration of the hose; however, the Court reporter was dismissed at the time the video tape was played and no record was made of the reading of the stipulation. In any event, the fact was before the trial judge in his determination of the Petitioners' Motion for New Trial.

(and Edwards and Garrision) could never be deemed appropriate and that the conduct of Petitioners did not represent reasonable remedial action to curtail or prevent continuing abusive practices (Respondent's Appendix E 25). In his expert opinion, it was "evident" that Mr. Slakan's unconstitutional assault was "a result of policies adopted or approved, or customs approved by the ... Secretary of Correction." (Respondent's Appendix E 24-26). This evidence, taken in conjunction with Petitioner's affirmative statutory duties to safeguard the welfare of inmates (Respondent's Appendix K 1-3), supports the jury's finding of liability against Petitioner Reed.

Petitioner Edwards

During his testimony Petitioner Edwards admitted that he knew of and approved the use of high pressure fire hoses and tear gas against cell-confined inmates and that he would ordinarily have been (and in all probability was) consulted regarding the 1975 Inmate Grievance Commission Recommendation.[5] (Respondent's Appendix L 3-5). In spite of the fact that he had the responsibility for the day to day operation of the prisons and the approval of equipment used to control emergencies (5 NCAC 2A .0101, 2F .1501 (b)(3) & (4); Respondent's Appendix K 4-6), Edwards admitted that (1) he never inspected or examined the high pressure fire hoses he approved, (2) he never issued orders requiring officers to supervise the guards' use of fire hoses or limit the time and manner that an inmate could be hosed; and (3) he never requested expert advice regarding the risk of injury from hosings. (Respondent's Appendix L 5-7). As in the case of

---

[5] The Response to the Recommendation states the Edwards "was fully briefed on the incident and he indicates his support of the action taken by the officers ... ." and "... recommendations ... (2) that the high pressure water hoses not be used on inmates locked within a cell unless there is imminent threat of phsyical danger to another person or with direct approval of the Warden, Deputy Warden or Shift Supervisor are DISAPPROVED." (Respondent's Appendix F 2).

Petitioner Reed, correctional expert Pontesso found Edward conduct to be deliberately indifferent to the threat of at inmates and causally related to the unconstitutional assau Mr. Slakan.

Petitioner Garrison

Petitioner Garrison had statutory responsibility for welfare of inmates assigned to his prison (Respondent's Ap K 3) and personally reviewed and approved use of force rep each of the nine incidents of use of force introduced in e at trial, including the hosing of a cell-confined, handcuf inmate. On cross examination, he admitted knowledge of an incident (not in the record) in which an inmate received a injury from a hosing. (Respondent's Appendix J 1,2). He admitted knowledge and approval of the Department's Respon the Inmate Grievance Commission Recommendation (that use o practices be reformed) as well as the fact that use of for practices and policies had not been altered after the Comm Recommendation, or after any of the use of force incidents evidence. (Respondent's Appendix J 11).

REASONS FOR DENYING THE WRIT

The petition for writ of certiorari should be denied. Petitioners' assertion that the verdict of the jury, enter after a four day trial, and the decisions of the district appellate courts "negate[s] the requirement of personal involvement as a predicate to liability under 42 U.S.C. § is not supported by a review of the record. Examination o Petitioners' statement of the Question Presented makes it difficult to discern whether Petitioners now challenge the standard applied in the courts below, or the sufficiency o

evidence supporting the jury's verdict. However, in either event, the record and the law support that verdict and dictate that a writ of certiorari be denied.

A. PETITIONERS FAILED TO OBJECT TO THE JURY INSTRUCTIONS REGARDING THE LEGAL STANDARD FOR § 1983 SUPERVISORY LIABILITY

It should first be observed that Petitioners did not object to the jury instructions at the charge conference during the trial. Portions of the instructions addressing the liability of the supervisory defendants, which are now apparently challenged, are set forth in the Respondent's Appendix, M 1-3.

The instructions clearly instructed the jury that "the greater weight of the evidence" must show that the supervisory officials "in some manner, acted personally in the deprivation of plaintiff's rights" and that "they may not be held liable merely on the grounds that they were the guards' supervisors in the chain of command. The plaintiff must establish a personal connection between the action or inaction of the supervisory defendants and the denial of the plaintiff's constitutional rights." (Respondent's Appendix M 1).

The instructions then state that personal involvement may be shown by proof of authorization in advance "which may have come from the policies and procedures instituted by these defendants." (Respondent's Appendix M 2). The trial court further instructed the jury, without objection, that personal involvement may be shown by acquiescence in alleged excessive use of force by the guards, [see Orpiano v. Johnson, 632 F.2d 1096, 1101 (4th Cir. 1980), cert denied, 450 U.S. 929 (1981)], if the jury found that "there was a pattern of instances where excessive and unreasonable force was used against him and/or other prisoners which was so pervasive that the defendant knew or should have

known about it, and failed to take reasonable steps to remedy the wrongdoing, such that his deliberate indifference was in effect a tacit authorization of the use of excessive and unreasonable force against plaintiff." The jury received additional instruction that the evidence must show that there were a number of such incidents such that supervisors were or should have been put on notice that subordinates engaged in an unlawful practice (excessive force) against a group of inmates of which plaintiff Siskan was a member. (Respondent's Appendix M 2)

With reference to Monell v. New York City Department of Social Services, 436 U.S. 658 (1978), the trial court instructions stated that supervisory defendants' policies or customs, which could be established by omissions as well as affirmative acts, could expose such defendants to liability if the policies or customs caused plaintiff's injury. And further, that officials with rule making responsibilities could be liable if their "unreasonable" failure to make rules (1) "rose to the level of deliberate indifference to plaintiff's constitutional rights or constituted tacit authorization of unconstitutional practices" and (2) "caused their employees unconstitutional practices." The instructions then recite the established statutory and regulatory rule-making powers of each of the three supervisory defendants. (Respondent's Appendix M 3)

Petitioners' failure to object to the instructions, which were drafted after a charge conference and include verbatim portions of Petitioners' own requested jury instructions (Respondent's Appendix M 1-3), should estop them from challenging the legal standard applied below. Rule 51, F.R.Civ.P., specifically prohibits assignment of error to a jury charge or instruction absent a timely objection. Rule 51 has been applied

strictly by federal appellate courts, subject to a limited plain error exception. Morris v. Travisono, 528 F.2d 856 (1st Cir. 1976).[6]

B. THE COURTS BELOW APPLIED THE CORRECTION AND ACCEPTED STANDARD OF LIABILITY FOR § 1983 SUPERVISORY LIABILITY

Petitioners assert that the decisions below have circumvented the requirement, attributed to Rizzo v. Goode, 423 U.S. 362 (1976) and Monell, supra, that "there must be evidence of an 'affirmative link' between a subordinate's misconduct and the adoption of a plan or policy showing the supervisors authorized such misconduct." (PWC p 6). Scrutiny of those cases and the record of the case sub judice refute petitioners' contention.

Rizzo, which involved claims for injunctive relief against the Philadelphia Police Department, addressed itself to the courts' exercise of equitable powers under § 1983 and recognized that previous decisions had properly upheld injunctions[7] against supervisory defendants under § 1983. See Hague v. CIO, 307 U.S. 496 (1939) and Allee v. Medrano, 416 U.S. 802 (1974).

The Rizzo Court found the district court findings and conclusions insufficient to support § 1983 injunctive relief in several regards. First, the individual policemen found to have violated constitutional rights were not named as party defendants with the defendant Mayor and police supervisors. Second, the facts revealed no "affirmative link between the occurrence of the various incidents of police misconduct and the adoption of a plan

---

[6] "Rule 51 is of considerable importance for the orderly and just functioning of the judicial system" and, "'[I]f there is to be a plain error exception to Rule 51 at all, it should be confined to the exceptional case where the error has seriously affected the fairness, integrity or public reputation of judicial proceedings.'" [quoting E.C. Wright & A. Miller, Federal Practice and Procedure § 2558, at 675 (1971)] Id., at 859.

[7] The Rizzo court observed that the "principles of equity ... militate against the grant of an injunction except in the most extraordinary circumstances." Id., at 379. A claim for damages under § 1983 does not involve the important and delicate principles of equity or federalism which were before the Court in Rizzo.

or policy by petitioners--express or otherwise--showing their authorization or approval of such conduct." (Emphasis added) Id., at 371. Third, the only connection found to exist between plaintiffs and supervisory defendants was the likelihood of future injury to non-parties absent changes in police disciplinary procedures. Fourth, the conclusion that a "pattern" of police misconduct existed was deemed inconsistent with the district court's finding that the challenged police behavior was typical of major urban police departments. Id., at 375.

The facts of the case sub judice are distinquished with respect to each of these issues. First, Petitioners herein were joined as defendants with the prison guards who assaulted Mr. Slakan on August 3, 1979.

Second, an "affirmative link" was established between plans and policies of the Petitioners and the unconstitutional assault on Mr. Slakan by evidence of (1) a 1975 Inmate Grievance Commission Recommendation to the Department of Correction that indiscriminate use of force, including high pressure fire hoses, against cell-confined inmates be curtailed; (2) Petitioners' actual or constructive knowledge and disregard of the Recommendation[8] and the threat to the rights of inmates it portended and; (3) the existence of a pattern of excessive use of force against cell-confined inmates[9] and; (4) the refusal or failure of Petitioners to take any meaningful or reasonable steps to remedy or curtail the use of excessive force against cell-confined inmates.

---

[8] Petitioners Garrison and Edwards, both of whom were referenced in the response to the Recommendation, admitted knowledge or probable knowledge of the Recommendation. Respondent's correctional expert witness testified that these officials and petitioner Reed should have known of the Recommendation in the exercise of ordinary care in their supervisory positions.

[9] Accounts of eight incidents of force against cell-confined inmates, including one incident involving an inmate being sprayed with a high pressure fire hose, were admitted into evidence by stipulation. The accounts were derived exclusively from prison guards' reports from one prison and spanned a period of one year prior to the assault on Mr. Slakan. Discovery of these incidents was resisted by Petitioners and broader discovery was not deemed necessary.

Third, Arnold Pontesso, a retired Bureau of Prison Warden and former Secretary of Correction in Oklahoma, testified that the prison practices regarding use of force against cell-confined inmates constituted a pattern of excessive use of force, uncommon, unacceptable and virtually unheard of in his experience in corrections. Thus, the approved conduct of the guards, unlike the behavior in Rizzo, cannot be characterized as typical of similar systems managed by supervisory defendants.

Finally, unlike Rizzo, the record herein indicates that the incidents of use of force against cell-confined inmates established "common thread" or "'pervasive pattern of intimidation' flowing from a deliberate plan by the named defendants...," Id., at 375.

Monell, which involved a challenge to a municipal agency's policies compelling unpaid, medically unnecessary pregnancy leave, is consistent with Rizzo in rejecting vicarious or respondeat superior liability under § 1983 while recognizing that supervisory action or inaction that causes the deprivation of rights is actionable under § 1983. Monell observed first that the language of the legislation specifically held liable "any person who, under color of state law...shall subject or cause to be subjected, any person...to the deprivation of rights... ." Id., at 692-693. [Quoting 42 U.S.C § 1983].

> "The italicized language plainly imposes liability on a government that, under color of some official policy 'causes' an employee to violate another's constitutional rights."

Ibid.

By reference to the legislative history of the Civil Rights Act, the Monell Court found that liability under respondeat superior was not intended under § 1983, but rather, that a supervisory governmental unit or official could be deemed liable if it was found to have "caused" the deprivation under § 1983. From the legislative history of § 1983, Monell suggests the supervising governmental bodies, as well as individuals, may be

held liable and to have caused the deprivation of rights if they "had power to intervene" and "neglect[ed] or refuse[d] to do so." Id., at 692 n. 57.[10]

> "[L]ocal governments, like every other § 1983 'person,' by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision-making channels."

Id., at 690-91.

The teachings of Monell[11], as well as the holding in Rizzo, were carefully applied in the case sub judice, wherein the district court instructed the jury that supervisory defendants must be shown to have acted personally, in some manner, and thus caused the deprivation of rights to be "visited" upon Mr. Slakan. The district court properly charged that the requisite personal involvement could be shown by proof of the existence of a pattern of excessive and unreasonable force against inmates like Mr. Slakan (cell-confined) such that the officials knew or should

---

[10] In the Appendix to the Opinion of the Court, the full text of the second conference substitute for the Sherman Amendment is set forth.

> "[A]ny person or persons having knowledge that any of the wrongs conspired to be done and mentioned in the second section of this act are about to be committed, and having power to prevent or aid in preventing the same, shall neglect or refuse to do so, and such wrongful act shall be committed, such person or persons shall be liable to the person injured, or his legal representatives." (Emphasis Added)."

Id., at 704. Earlier legislative discussion of the Act stated that "[t]he primary constitutional justification for the Sherman amendment was that it was "necessary and proper remedy for the failure of localities to protect citizens..." and "... the amendment came into play only when a locality was at fault or had knowingly neglected its duty to provide protection." (Emphasis added.) Id., at 692 n. 57.

[11] Monell interpreted Rizzo in a manner consistent with the court's below: "[B]y our decision in Rizzo v. Goode, [supra], we would appear to have decided that mere right to control without any control or directions having been exercised and without any failure to supervise is not enough to support § 1983 liability." (Emphasis Added). Id., at 694 n.58 By showing supervisors' disregard for the known need to control and supervise, Respondent's evidence established precisely the "affirmative link" which was absent in Rizzo.

have known about it, and failed to take reasonable remedial steps to the point that their conduct evidenced deliberate indifference to or tacit authorization of the use of excessive force.[12]

The record in the case sub judice, unlike that in Rizzo, clearly supports the finding of an affirmative link between the guards' violation of Mr. Slakan's eighth amendment rights and the supervisory defendants' adoption of a plan or policy tacitly authorizing such misconduct. The Petitioners all knew and approved of the complained-of practices. Each Petitioner knew or should have known of the Inmate Grievance Commission's Recommendation against the indiscriminate use of force against cell-confined inmates. Hosings and macings of cell-confined inmates continued unabated.

Based upon the record, the jury found that Petitioners had or should have had knowledge of the past abusive practices and the likelihood of continued abuse if they refused to take remedial action. The record supports the jury's finding of Petitioners' authorization of, indifference to, or acquiescence in the abusive practices of the guards which caused the deprivation of Mr. Slakan's rights.

Indeed, the jury's recognition of this "link," as well as the weight of the evidence supporting the supervisory defendants' personal responsibility for Mr. Slakan's injury, is reflected in the award of damages among the respective defendants.[13] Through deliberate indifference to a known policy of indiscriminate use

---

[12] In the context of medical care to prisoners, the Court recognized the distinction between inadvertent and advertent conduct in Estelle v. Gamble, 429 U.S. 97 (1976).

> "...in the medical context, an inadvertent failure to provide medical care cannot be said to constitute 'an unnecessary and wanton infliction of pain' or to 'be repugnant to the conscience of mankind.' ... In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend 'evolving standards of decency' in violation of the Eighth Amendment." Id., 429 U.S., at 100, 101.

[13] The jury's perception of the facts and acceptance of the Respondent's theory of the case is borne out by the award of damages. Five hundred dollars ($500.00) in compensatory damages were awarded against five of the six defendants. Awards of punitive or exemplary damages increased with respect to the defendants' authority: Reed ($10,000.00), Edwards ($8,000.00), Garrison ($7,000.00); Walters ($3,000.00); Porter ($2,000.00).

of force against cell-confined inmates, the Petitioners caused Mr. Slakan to be subjected to a deprivation of his rights under the Eighth Amendment of the United States Constitution. Section 1983 liability for such conduct is supported by equity, common sense, the language of the Act, its legislative history, and the decisions of this Court.[14]

C. THE DECISION BELOW IS CONSISTENT WITH THE LAW THROUGHOUT THE CIRCUIT COURTS OF APPEAL

Petitioners assert that the decision below has new and undesired implications as to supervisory officials' liability under § 1983. However, except for the evidence and jury verdict, Mr. Slakan's case and the legal standards applied below merely reflect the law as it has been interpreted throughout the circuit courts of appeal.[15] Petitioners do not contend that a conflict

---

[14] See, e.g. Municipal Liability Under Section 1983: The Meaning of "Policy or Custom," Note, 78 Col.L.R. 308; Eagan, The Scope of Supervisory Liability Under 42 U.S.C. § 1983, 6 J. Contemp. L. 181 (1979).

[15] Cases involving § 1983 claims for damages against supervisory officials or governmental units have applied the law in a manner consistent with the decision below. Cases turn on the facts in the record supporting "supervisory" liability. King v. Higgins, 702 F.2d 18, 21 (1st Cir. 1983)(damages against prison superintendent for failure to correct improper disciplinary procedure after receiving notice; "[D]efendant apparently does not dispute the fact that as the official designated to hear prisoners' appeals, he should be liable in damages for his inaction in curing deficiencies in the disciplinary proceedings of which he was aware. See Rizzo v. Goode [supra]."); Turpin v. Mailet, 619 F.2d 196, 201-202 (2nd Cir. 1980), cert. denied, 449 U.S. 1016 (1982)(city may be liable for damages under § 1983 "where senior personnel have knowledge of constitutionally offensive acts but fail to take remedial steps" amounting "to deliberate indifference to or tacit authorization of the offensive acts;" evidence held insufficient to support inference), see also Owens v. Haas, 601 F.2d 1242, 1246 (2nd Cir. 1979) cert. denied, 444 U.S. 980 (1979), McCann v. Coughlin, 698 F.2d 112 (2nd Cir. 1983); Jerry v. Francesco, 632 F.2d 252, 256 (3d Cir. 1980)(J. Adams, concurring)(warden with statutory duty to safeguard jail inmates may be held liable for § 1983 damages resulting from "general conditions and policies within the superivory purview of the officer in charge of the prison."); Wanger v. Bonner, 621 F.2d 675, 680 (5th Cir. 1980)(Sheriff may be held liable for damages under § 1983 for acts of deputies if "he knew of or should have known that allegedly unconstitutional acts were occurring and acquiesced in them," causing violation of rights), see also Languirand v. Hayden, 717 F.2d 220, 227-228 (5th Cir. 1983), Webster v. City of Houston, 689 F.2d 1220 (5th Cir. 1982), Bowen v. Watkins, 669 F.2d 979, 988-89 (5th Cir. 1982); Hays v. Jefferson County, Ky, 668 F.2d 869, 874 (6th Cir. 1982) cert. denied, 459 U.S. 833 (1982) ("At a minimum a plaintiff must show that the [supervisory] official at least implicity authorized, approved or

exists within the circuits and, contrary to their assertions, the case sub judice does not present a new developement or even a change in the law.

D. THE EVIDENCE IS SUFFICIENT TO SUPPORT THE JURY'S VERDICT

Petitioners further argue that their conduct was too remote from the unconstitutional assault on Mr. Slakan to establish liability. The court below correctly observed that this same contention, regarding causation or proximate cause, raised an issue essentially of fact, not law, Slakan, 737 F.2d at 373, and found the evidence more than sufficient to support the jury's finding. As observed by the Fourth Circuit Court of Appeals, "fact finding by jury will be set aside only where evidence, viewed in light most favorable to prevailing party, is so clearly wrong that reasonable persons could not reach any other conclusion than asserted by the losing party on appeal." See e.g. 5A Moore Federal Practice § 50.07 [2] at 50-82 to 50-83 (2nd Ed. 1977). The recitation of the evidence set forth in the court

---

knowingly acquiesced in the unconstitutional conduct of the offending officers."); Lenard v. Argento, 699 F.2d 874, 886 (7th Cir. 1983) cert. denied, ___ U.S. ___, 104 S.Ct. 69 (1983)("Only where there is a pattern of constitutionally offensive acts with failure to invoke remedial measures will there result in municipal liability for subsequent violations 'if the supervisor's inaction amounts to deliberate indifference or tacit authorization of the offensive acts.'" [quoting Turpin v. Mailet, [supra.]); Villanueva v. George, 659 F.2d 851, 854 (8th Cir. 1981)(En Banc)(chief jailor may be held liable for money damages under § 1983 if he had knowledge that detainees "conditions of confinement were punitive and yet refused to remedy same. See Estelle v. Gamble [supra]"), see also Herrera v. Valentine, 653 F.2d 1220, 1224 (8th Cir. 1981); White v. Washington Public Power Supply System, 692 F.2d 1286, 1290 (9th Cir. 1982)(evidence insufficent to support § 1983 damages/liability against public corporation; "[t]here must be a showing either of official sanction of the agents' acts, or of culpable negligence, or impliedly or tacitly authorized approved or encouraged discriminatory conduct as a matter of course on the part of the employer in failing to correct known slurs or other discriminatory acts of its employees."), see also Haygood v. Younger, 718 F.2d 1472 (9th Cir. 1983); McClelland v. Facteau, 610 F.2d 693, 697 (10th Cir. 1979)(cause of action under § 1983 exists against police chief for allegedly abusive acts of subordinates if chief "knew or should have known of the misconduct and yet failed to act to prevent future harm."); Williams v. Bennett, 689 F.2d 1370, 1380-1381, (11th Cir. 1982), cert. denied, ___ U.S. ___ 104 S.Ct. 335 (1984)(§ 1983 action for damages against individual prison officials for subjection to cruel and unusual prison conditions requires a showing of deliberate indifference to his need for reasonable protection from violence which in fact caused the deprivation of rights).

of appeals' opinion clearly indicates that the evidence was sufficient to support the verdict against the Petitioners herein. Compare Turpin v. Mailet, supra.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted, this the ___ day of February, 1985.

NORTH CAROLINA PRISONER LEGAL SERVICES, INC.
Attorney for Respondent

By: _____

Charles T. L. Anderson
Post Office Box 509
Raleigh, North Carolina 27602
Telephone: (919) 828-3508